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Supreme Court of the United States,

OCTOBER TERM, 1904.

NO. 137.

CITY OF OHLAHOMA CITY,
Plaintiff in Error and Appellant,

vs.

FRANK McMASTER.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA

BRIEF FOR McMASTER.

FRANCIS J. KEARFUL,
Of counsel for McMaster.

[19,127.]

SUPREME COURT OF THE UNITED STATES,

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BRIEF FOR MCMASTER.

By a writ of error and also by an appeal (*record*, 1–18) the city of Oklahoma City brings to this court for review a judgment of the Supreme Court of the Territory of Oklahoma (*record*, 57) affirming a judgment of the District Court of Oklahoma county against it in favor of McMaster for recovery of the possession as owner of two certain lots in Oklahoma City, together with damages for the wrongful detention thereof (*record*, 58, 63).

I.

THE RECORD PRESENTS NOTHING FOR THIS COURT TO REVIEW.

1. *The motions to dismiss and affirm.*

On November 28, 1904, we presented to this court on behalf of McMaster motions to dismiss and affirm (consideration of which was postponed to the hearing on the merits) showing that the writ of error should be

dismissed, because the case was tried without a jury (*record*, 62), and that the judgment appealed from should be affirmed, because the record contained no "statement of facts and rulings certified by the court below," as required by the act of Congress of April 7, 1874, c. 80, § 2 (18 Stat. 27–28) and the decisions of this court in cases coming by appeal from the territorial courts (*Motions and Brief*, 4–7; *Stringfellow* v. *Cain*, 99 U. S. 610, 612; *Cannon* v. *Pratt*, 99 U. S. 619, 621–622; *Davis* v. *Fredericks*, 104 U. S. 618, 619; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Gray* v. *Howe*, 108 U. S. 12, 13; *Story* v. *Block*, 119 U. S. 235, 236–237; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 513–514; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 117; *Marshall* v. *Burtis*, 172 U. S. 630, 635; *Cohn* v. *Daley*, 174 U. S. 539, 544–545; *Thompson* v. *Ferry*, 180 U. S. 484, 485; *United States* v. *Hooe*, 1 Cranch, 318, 319–320).[1] Counsel for the City, in answer to the motions, abandon the writ of error and rely upon the appeal alone (*Answer to Motions and Brief*, 26-27), basing their claim to a compliance with the statute in cases of appeal solely upon the opinion of the territorial Supreme Court. They say (*ib.* 27):

> "The statement of facts is contained in what the court calls a 'statement of the case,' in the opinion of the court, written by Irwin, J."

And again (*ib.* 38):

> "Now we are not asking, in the case at bar, any review in matter of fact, but are only asking

[1] If the decision in *Comstock* v. *Eagleton*, on January 3, 1905, applies to this case, the appeal should be dismissed because the action is an action at law, and the writ of error should be dismissed for the lack of a bill of exceptions. See brief, *infra*, p, 18.

> this court to pass upon the questions of law which we present upon the facts as presented by the decision of the Supreme Court of the Territory of Oklahoma, and *we are asking this court to consider the facts as they are stated in the opinion of that court, and to correct the application of the law thereto.*"

It is therefore quite clear that unless the opinion of the court below can be held to be a compliance with the statute, the record presents nothing for review and the judgment will have to be affirmed.

Is the opinion a compliance with the statute? The provision is (18 Stat. 28):

> "*Provided*, that on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

There is no statute of the United States or of Oklahoma or any rule of court requiring the opinion of the territorial Supreme Court to contain "a statement of the facts of the case in the nature of a special verdict" or a statement of "the rulings of the court on the admission or rejection of evidence when excepted to," or that the opinion shall be "made and certified by the court below and transmitted to the Supreme Court" as such statement of facts and rulings. The opinion and dissenting opinion in this case were prepared by Judge Irwin and Judge Pancoast of the court below and filed with the papers in the case in compliance

with section 4456 of the Oklahoma Statutes of 1893, which reads (p. 859):

> "It shall be the duty of the judges of the supreme court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed."

And the opinions were transmitted to this court by the clerk of the court below in compliance with section 2 of Rule 8, which reads:

> "In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case."

Although these opinions are thus properly before the court for its information as to the questions presented to and decided by the court below (*San Jose Land Co.* v. *San Jose Ranch*, 189 U. S. 177, and cases cited; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 116), it is quite evident that in no case can an opinion of the court below, merely as such and of itself alone, form the basis of any assignment of error. A successful party has no voice in the preparation of an opinion. He is not consulted or permitted to be heard as to its contents, and his rights cannot be held to rest upon any such basis. He has a judgment and

the statute points the way to his adversary if he would seek a review in this court.

"A statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below." But the court below is under no duty to make and certify any such statement unless application therefor be made to it by the defeated party in contemplation of an appeal. It cannot know when it prepares its opinion that an appeal will be taken. In the orderly course of obtaining such a statement as that contemplated by the statute, it would be applied for by the defeated party after due notice of his intention to appeal, and both parties would thereupon be accorded an opportunity to be heard as to its contents. Then, if either party should fail to have inserted in the statement of facts and rulings all to which his rights entitle him, the responsibility would be his. Any other course would cast upon the successful party the burden of obtaining a statement of facts and rulings sufficient to support the judgment on an appeal by his adversary, contrary to the most familiar elementary principles. Therefore, it is not strange that counsel for the City are unable to cite a single instance of an acceptance by this court of the opinion of the court below as a substitute for the statement required by the statute. But instances to the contrary are numerous in cases arising under this very statute and the analogous provisions relating to appeals from the Court of Claims and the Circuit Courts of the United States. In

Thompson v. *Ferry*, 180 U. S. 484, an appeal from the Supreme Court of Arizona was affirmed for the lack of a proper statement, and the Chief Justice said:

> "The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such."

The record of that case also shows (pp. 117, 120) that the opinion of the territorial Supreme Court "by Street, C. J." contained a "Statement" preceding the "Opinion" in which are set forth the facts and rulings upon which its conclusions are based. So in the case at bar, there is an "Opinion by Irwin, J." (*record*, 57), containing a "Statement of the Case" (*record*, 58), and a "Dissenting opinion by Pancoast, J." (*record*, 71).

In *Gray* v. *Howe*, 108 U. S. 12, where the judgment of the Supreme Court of the territory of Utah was affirmed for the lack of this required statement, the record (p. 16) contained "the opinion of said court in said cause" which stated the facts and conclusions upon which the judgment was rendered.

In *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 116, the court read the decree of the Supreme Court of Utah in the light of its opinion for the purpose of determining its finality for the purpose of appeal, but as it appeared (p. 118) that there was no requisite statement of facts and rulings the decree was affirmed. The record (pp. 57–60) contains an opinion of all the judges which refers to the testimony, exhibits and pleadings, also contained in the record.

In *Stone* v. *United States*, 164 U. S. 380, 383, affirm-

ing a judgment appealed from the Court of Claims, the court, by Mr. Justice Brewer, said:

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings."

In *Lehnen* v. *Dickson*, 148 U. S. 71, counsel sought to cure the lack of sufficient findings of facts by reference to the opinion of the judge of the Circuit Court, but this court, by Mr. Justice Brewer, said (p. 77):

> "They suggest that in the opinion delivered by the trial judge there is a narration of the facts we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal question: 'Thayer, District Judge, after stating the facts above,' and claim that such statement is equivalent to a finding of the facts as previously recited. . . . With reference to the language of Judge Thayer, it is obvious that no such significance as is claimed can be given to the words 'after stating the facts as above.' Reading the prior statement, it would seem to be only a succinct recital of the material testimony in the case. *Noris* v. *Jackson*, 9 Wall. 125."

In *Dickinson* v. *The Planters' Bank*, 16 Wall. 250, 257, an appeal from a Circuit Court, the court, affirming the judgment, by Strong, J., said:

> "Here the record as returned contains what is stated to be what is all the evidence in the cause, but the court has not found what the evidence proves, nor any ultimate facts except that stated in the judgment, 'that the defendant did not assume and promise as the plaintiff in declaring has alleged.' Some facts indeed are stated in the opinion of the court, that seem to have accompanied the judgment, but they

> are not stated as a special finding. They are rather advanced as reasons why the judge came to the conclusion that the alleged promise of the defendants had not been proved. It is impossible to regard anything that appears in this case as equivalent to a special verdict."

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, 51, the Court, by Mr. Justice Miller, said:

> "We are asked in the present case to accept the opinion of the court below as a sufficient finding of the facts within the statute, and within the general rule on this subject. But, with no aid outside the record, we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence."

But even if the opinion of the court below may in a proper case be regarded as a compliance with the statute, this is not such a case. For the purpose of enabling the counsel for the City to present their assignments of error, they show that the court in giving the reasons for its judgment, among other things, referred to "the substantial part" of one of the exhibits "contained in the 'case-made,'" and (*Answer to Motions, 29–30*)—

> "thus we claim carried the same into the opinion of the court, by its reference, with the same force and effect as if they had specifically set it out therein."

There could be no stronger proof than this of the insufficiency of the opinion as a statement of facts and rulings under the statute. If incorporation of such exhibit by reference were permitted we perceive no

reason why the entire record should not be incorporated in the same way. The court also refers to the judgment of November 14, 1892, introduced by McMaster as the basis of his claim (*record*, 62), and this cannot be incorporated because it is not found in the record, although its consideration would be of vital and controlling importance to McMaster.

That such incorporation by reference in a statement under the statute cannot be permitted, is abundantly shown by *Thompson* v. *Ferry*, 180 U. S. 484–485, and *Cohn* v. *Daley*, 174 U. S. 539, 542–543.

2. *The alternative motion for an order on the territorial Supreme Court.*

Apparently, in realization of the weakness of their position, counsel for the City supplement their answering brief with a counter alternative motion for an "order upon the Supreme Court of Oklahoma to make, certify and transmit to this court a statement of facts of the above cause in the nature of a special verdict," etc. (*Answer to Motions and Brief*, 42). As to such alternative motion it should be sufficient to observe that nowhere appears any demand upon or refusal by the territorial Supreme Court to make or certify or transmit a statement of facts or rulings,—obviously an essential prerequisite to the granting of the motion. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 32; *Hudson* v. *Parker*, 156 U. S. 277, 288.

Moreover, an inspection of the record certified from the territorial Supreme Court shows, not only that a refusal by it to make the required statement of facts and rulings would be justified, but that it would be im-

possible for it to make such a statement upon the record before it. That record consists of a "case-made" certified from the trial court (*record*, 21–54), which shows that the plaintiff McMaster introduced in evidence "a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892." It was admitted and "marked exhibit 'B.'" He also introduced "a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma County wherein the land is situated," which was also admitted and "marked under the same order" (*record*, 25). A further order "by Judge Burford, in the same case, dated October 13th, 1893" (*record*, 25, 38), refers to the judgment of "the 14th day of November, 1892," as adjudging the right of McMaster to a deed of the lots in question, in accordance with which the townsite trustees are ordered to execute and deliver to him such deed.

The judgment of November 14, 1892, adjudging the right of McMaster to these lots, together with the certificate of the register of deeds showing it to have been "recorded in his office in Oklahoma county wherein the land is situated" had all the force and effect of a deed by virtue of the Oklahoma statutes of 1897, page 98, which provides (§ 32):

> "Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record, and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged."

It thus appears that these two documents were the very basis of McMaster's claim of ownership and right of possession to the lots in question. But although this is so, neither of them anywhere appear in the record. The document marked "exhibit B" (*record*, 36) nowhere appears to have been introduced in evidence. It appears to be a statement of facts and conclusions made by the same judge in the same cause in which the judgment of November 14, 1892, was rendered, but it was made on or prior to May 11, 1892, as appears from the certificate of the clerk (*record*, 37), but it certainly is not the judgment of November 14, 1892. We may surmise that this statement was a part of the judgment roll, and that the remainder, including the judgment of November 14, 1892, was omitted from the case made through inadvertence or otherwise, but, of this there is no proof, and neither this court nor the territorial Supreme Court can act upon surmises. It does not appear that the judgment of November 14, 1892, and the certificate of its recording, were before the territorial Supreme Court, but the fact that it was admitted in evidence and was before the trial court, and the further fact that it is not identical with exhibit B shown in the record appears from the following extract from the statement of facts in the opinion (*record*, 62):

> "The plaintiff introduced in evidence patent from the United States Government to the town site trustees. Objected to. Overruled. Exception. Plaintiff then introduced judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford on the 14th day

> of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception."

In this condition of the record, it would be impossible for the Supreme Court to make a proper statement of facts and rulings, for such a statement, in the absence of findings by the trial court, would require a consideration of the evidence. In *School District* v. *Trotter*, 10 Oklahoma, 625, 626–627, the Supreme Court of Oklahoma, by Hainer, J., said:

> "The basis of this action was the contract, which the plaintiff alleges was entered into between herself and the school district, the plaintiff in error. It appears from the case made that this contract was introduced in evidence, but has been, through inadvertence or otherwise, left out of the record. This court has repeatedly held that where the questions presented to this court for review by the plaintiff in error depend upon the consideration of the evidence introduced upon the trial in the court below, the case-made must contain all the evidence, and this must affirmatively appear in the case-made itself. A mere statement in the certificate of the district judge that it contains all the evidence is not sufficient."

To the same effect is *Pierce* v. *Engleheimer*, 10 Oklahoma, 308, 315, and cases cited.

In this situation it cannot be supposed that the territorial Supreme Court would undertake to "make, certify and transmit" the statement of facts and rulings required by the statute and contemplated by the alter-

native motion made on behalf of the City. An application therefor would be refused, and the refusal would be abundantly justified (*Armijo* v. *Armijo*, 181 U. S. 558, 561).

II.

THE MERITS PRESENTED BY THE OPINION.

Assuming, however, that the court may accept the "statement of the case" contained in the opinion of Judge Irwin as a compliance with the statute, we pass to a consideration of the merits of the case thus presented. The statement is as follows (*record*, 58):

> "*Statement of the Case.*
>
> This is an action brought by the defendant in error, Frank McMaster, against the plaintiff in error, The City of Oklahoma City, in the district court of Oklahoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, to wit, lots numbers one and two of block number twenty-four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof."

Then follow the pleadings, consisting of the plaintiff's petition alleging in substance that he is the legal and equitable owner and entitled to the possession of the lots in controversy, and that the defendant, a municipal corporation, unlawfully keeps him out of the possession thereof, and praying judgment for its recovery and damages for withholding the possession (*record*, 59); the defendant's general demurrer to the petition which "was

by the court overruled, to which the defendant excepted" (*record*, 60); the defendant's answer, containing the defense in substance that the tract claimed by the plaintiff as lots are a part of a lawful "public highway and street of said city," and that the plaintiff has not and never had any interest therein (*record*, 60–61); the plaintiff's replication denying the allegations of the answer that contradict the petition (*record*, 62); after which the statement continues and concludes (*record*, 62–63):

> "And on the 15th day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the town site trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.
>
> Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893, with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses were then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case, the journal and the

order made by the court in case No. 278, of the district court of Oklahoma county, entitled Frank McMasters *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue, in said cause. And thereafter the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection overruled. Exception.

The defendant proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page 11–12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are

wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review."

The action was authorized by Section 614, Oklahoma Civil Code (Stat. 1893, p. 864), which reads:

> "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable interest therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 127 here referred to reads (*ib.* p. 782):

> "In any action for the recovery of real property, it shall be designated with such convenient certainty as will enable an officer holding an execution to identify it."

The answer, by denying the plaintiff's title, admitted its possession. Section 615 provides (*ib.* p. 865):

> "It shall be sufficient in such action, if the defendant in his answer, deny, generally, the title

> alleged in the petition, or that he withholds the possession, as the case may be, but if he denies the title of the plaintiff, possession by the defendant shall be taken as admitted."

Issue as to the defendant's claim that the tract in question was a part of a lawful street and public highway was joined by the replication, to which no objection was made, and the parties proceeded to trial before the court after waiving a jury. The result of the trial was a general judgment for McMaster for the recovery of the lots in question and damages for the wrongful detention thereof (*record*, 63).

No objection is made to that part of the judgment awarding damages for the wrongful detention.

The trial judge made no finding of facts other than the general one contained in the journal entry of its judgment that "the plaintiff is the legal and equitable owner and entitled to the possession" of the tract in question (describing it); that "the defendant, since November 14, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14, 1892, is $250 per year; and that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages," etc. (*record*, 48).

The District Court of Oklahoma county is one of general original jurisdiction (Organic Act, § 9, 26 Stat. at L. 85), and a general judgment by a court of this character, in the absence of special findings, implies a finding of all facts necessary to support the judgment. As this

court had occasion to say at the present term, speaking through Mr. Justice Brewer in *Fayerweather* v. *Ritch*, 195 U. S. 276, 307:

> "Of course, the omission of special findings means nothing, for the judgment implies a finding of all necessary facts."

The Supreme Court, by affirming this judgment (*record*, 57) without findings "in the nature of a special verdict," will be deemed to have adopted the general finding of the District Court. *Cannon* v. *Pratt*, 99 U. S. 619, 621–622.

We might rest the consideration of this case here, but the points made by counsel for the City based upon alleged erroneous rulings of the trial court present little difficulty and may be noticed.

III.

CONSIDERATION OF THE POINTS MADE BY THE PLAINTIFF IN ERROR AND APPELLANT.

1. *The absence of a bill of exceptions.*

A fundamental objection to the entire argument of the counsel for the City on the merits is that the record contains no bill of exceptions showing the alleged erroneous rulings on the trial, and the grounds of objection thereto as required by the Oklahoma statutes. Sections 311 to 315 of the Oklahoma Civil Code (Stat. 1893, pp. 813-814) provide:

> "§311. An exception is an objection taken to a decision of the court or judge upon a matter of law.
>
> §312. The party objecting to the decision must except at the time the decision is made, and time

may be given to reduce the exception to writing, but not beyond the term. If the decision objected to is made in vacation or at chambers, the judge may give time to reduce the exception to writing, not exceeding ten days.

§313. No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

§ 314. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

§ 315. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large on the journal. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid."

We have seen that the "case-made" as it appears in the record is so defective as to exclude it from consideration (*supra*, pp. 10–12). Outside of it there was nothing to show what occurred in the trial court. It was "Exhibit A" to the "Petition in Error" by which the case was taken to the territorial Supreme Court (*record*, 19, 21), and upon these two papers the judgment was affirmed. There was no transcript of the record brought from the trial court, which would show the bill of exceptions, if any, and the so-called case-made cannot be permitted to serve as a bill of exceptions or proper transcript of the

record. *Schumacker* v. *O'Brien*, 19 Kansas, 476, 477; *Herren* v. *Merrilees*, 7 Oklahoma, 261, 266. This is fatal to every claim of error, as this court has decided at the present term. *Metropolitan R. Co.* v. *District of Columbia*, 195 U. S. 322, 329. See also *Armijo* v. *Armijo*, 181 U. S. 558; *Cohn* v. *Daley*, 174 U. S. 539, 544; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Comstock* v. *Eagleton*, opinion Jan. 3, 1905.

2. *The order reinstating the judgment.*

The principal claim of error is based upon the ruling of the trial court in setting aside the order granting a second trial after judgment and reinstating the judgment on motion of the plaintiff (*record*, 63). This claim of error was not presented to the territorial Supreme Court, and was therefore by that court rightly deemed to have been abandoned. This ruling is in accordance with established principles, as shown by the numerous cases cited in the opinion (*record*, 64-66), in one of which Mr. Justice Brewer, then a justice of the Supreme Court of Kansas, delivered the opinion. *Campbell* v. *Phillips*, 28 Kansas, 753, 754. It is also in accordance with the practice of this court. *Duvall* v. *United States*, 154 U. S. 548. And this court will not consider a matter assigned as error which has not been properly presented in the court below and there adjudicated. *Chicago, etc., Ry. Co.* v. *McGuire*, opinion Mr. Justice Brown, Jan. 3, 1905, and cases cited. But even if the objection were still open it is manifestly groundless when we observe that neither the grounds of the ruling nor the grounds of the City's objection thereto anywhere appear in the record. For all that appears,

there was evidence before the trial court showing that the statute allowing such second trial (Okla. Stat. 1893, p. 865, § 618) had not been complied with. Two motions to reinstate the judgment made on behalf of McMaster are shown in the record (49–51), neither of which are referred to in the order reinstating the judgment (*record*, 51). This order makes no finding, and, according to the familiar rule in such cases, a finding of all the facts necessary to support it will be implied. *Fayerweather* v. *Ritch*, 195 U. S. 276, 307.

3. *The judgment in the case of McMaster* vs. *Townsite Trustees.*

As proof of his title in the trial court, McMaster introduced a "judgment rendered in the case of McMaster *vs.* Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892," after having introduced "patent from the United States Government to the townsite trustees" (*record*, 62, 25). Counsel for the City claim that this was error. It could not be error unless the judgment were wholly void, and this the counsel claim, but an insuperable difficulty in so holding lies in the fact that the judgment, although before the trial court, is not to be found in the record. Evidently counsel labor under a very great misapprehension, for they seem to consider that a paper found in the record (p. 36) and purporting to be findings by Judge Burford in the case against the townsite trustees was the judgment of November 14, 1892, upon which McMaster founds his claim of title. But this assumption is wholly unwarranted, as we have before shown (*supra*, pp. 10–12). With this fact

in mind, the entire contention of counsel for the City on this head falls to the ground. Even if the supposed findings were made in that case, and it does not appear that they were, there is nothing to show that the Court based its judgment of November 14, 1892, upon them. For all that appears, they may have been withdrawn or further findings made. Indeed, there is absolutely nothing to show that they were ever introduced in evidence in this case.

With an apology for indulging in speculation in the absence of the judgment of November 14, 1892, against the townsite trustees, we suggest it may be assumed that it had been determined by a proper proceeding before the proper tribunal that McMaster was the only person having any claim to the tract in question consisting of the two town lots in controversy; that thereupon it became the duty of the trustees to execute and deliver to McMaster a deed to these lots in execution of the trust assumed by them under the act of May 14, 1890, c. 207 (26 Stat. 109). For all that appears, the townsite trustees themselves had determined in favor of McMaster and had arbitrarily withheld from him the deed to which he was entitled. It is permissible to assume that this is so if necessary to sustain the judgment. *Fayerweather* v. *Ritch*, 195 U. S. 276, 307. Certainly in such a case the District Court of Canadian county on a change of venue from Oklahoma county (*record*, 62–63, 39, 30), had jurisdiction in a suit by McMaster against the trustees to compel them to give him his deed, for it was invested with general

original jurisdiction by the Oklahoma Organic Act, § 9 (26 Stat. 85–86).

These considerations also dispose of the contention that McMaster never acquired any vested interest in the lots in controversy.

4. *Appropriation of McMaster's lots for a public use.*

It is next objected that this action would not lie because the lots claimed by McMaster had been appropriated by the City and used as a public street. There might be something in this objection under the authorities cited by counsel for the City if the action were to recover the title "subject to the easement" (*Appellant's brief*, 60). There is in this case no question of a valid dedication to a public use,—nothing to interfere with the plaintiff's rightful possession but the wrongful acts of the defendant. The issue as to this point was distinctly made by the pleadings and must be held to have been ruled in favor of the plaintiff in the trial court on the testimony.

5. *The proper tribunal for the settlement of conflicting claims to Oklahoma town lots.*

There is in this case no necessity to determine whether claimants to town lots under the act of May 14, 1890 (26 Stat. 109), must prosecute their claims in the land department of the Government or in the territorial courts under the regulations established by the Secretary of the Interior, which provide for appeal to the Commissioner of the General Land Office and also for resort to the courts "for the purpose of settling the title to the lot or lots in controversy." *McDaid* v.

Oklahoma, 150 U. S. 209, 216. It is unnecessary because, in the absence of anything to the contrary, it must be presumed in support of the judgment of November 14, 1892, and of the judgment in this case that the proper procedure was taken and resulted favorably to McMaster.

IV.

CONCLUSION.

The writ of error and appeal should be dismissed, or the judgment appealed from should be affirmed.

Washington, Jan. 14, 1905.

FRANCIS J. KEARFUL,
Of Counsel for McMaster.